

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

ROBERT WAYNE GIBBONS,

Plaintiff,

v.

WASHINGTON DEPARTMENT OF  
CORRECTIONS, CLALLAM BAY  
CORRECTIONS CENTER, THURSTON  
COUNTY SUPERIOR COURT,  
THURSTON COUNTY CLERKS OFFICE,  
THURSTON COUNTY OFFICE OF  
ASSIGNED COUNSEL, BETTY J. GOULD,  
ROBERT JIMMERSON, JOHN TUNHEIM,  
DAN PACHOLKE, THURSTON COUNTY  
PROSECUTORS OFFICE,

Defendants.

No. C12-5819 BHS/KLS

ORDER TO AMEND OR SHOW CAUSE

This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Plaintiff has been granted leave to proceed *in forma pauperis*. Presently before the Court for review is Plaintiff's proposed civil rights complaint. ECF No. 7. The Court will not direct service of Plaintiff's complaint at this time because it is deficient, as is explained in further detail below. However, Plaintiff will be given an opportunity to explain why his complaint should not be dismissed or, alternatively, to submit an amended complaint for the Court's review.

**DISCUSSION**

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or

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1 employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint  
2 or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that  
3 fail to state a claim upon which relief may be granted, or that seek monetary relief from a  
4 defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See  
5 *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

6  
7 A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*  
8 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.  
9 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
10 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,  
11 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim  
12 upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right  
13 to relief above the speculative level, on the assumption that all the allegations in the complaint  
14 are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007) (citations omitted).  
15 In other words, failure to present enough facts to state a claim for relief that is plausible on the  
16 face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

17  
18 Although complaints are to be liberally construed in a plaintiff’s favor, conclusory  
19 allegations of the law, unsupported conclusions, and unwarranted inferences need not be  
20 accepted as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Neither can the court supply  
21 essential facts that an inmate has failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of*  
22 *Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). Unless it is absolutely clear that  
23 amendment would be futile, however, a pro se litigant must be given the opportunity to amend  
24 his complaint to correct any deficiencies. *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).  
25  
26

1 Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, “the complaint [must  
2 provide] ‘the defendant fair notice of what the plaintiff’s claim is and the ground upon which it  
3 rests.’” *Kimes v. Stone* 84 F.3d 1121, 1129 (9th Cir. 1996) (citations omitted). In addition, in  
4 order to obtain relief against a defendant under 42 U.S.C. § 1983, a plaintiff must prove that the  
5 particular defendant has caused or personally participated in causing the deprivation of a  
6 particular protected constitutional right. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981).  
7 To be liable for “causing” the deprivation of a constitutional right, the particular defendant must  
8 commit an affirmative act, or omit to perform an act, that he or she is legally required to do, and  
9 which causes the plaintiff’s deprivation. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).  
10

11 Plaintiff is presently incarcerated at the Coyote Ridge Corrections Center. His complaint,  
12 however, is related to an incarceration he served at the Clallam Bay Corrections Center from  
13 February 2010 to February 18, 2011, pursuant to a judgment and sentence for taking a motor  
14 vehicle without permission. ECF No. 7, at 4. He alleges that he moved to amend his judgment  
15 and sentence after discovery that a mistake had been made in calculating his violation scores.  
16 His motion was granted, his release date dramatically reduced, and his release date was set for  
17 September 21, 2010. However, he received no notice of the judgment until February 27, 2011.  
18 Although he requested a copy, the Clerk refused to provide him with a copy of the revised  
19 judgment unless he paid for a copy. He alleges that he was not released from Clallam Bay  
20 Corrections Center until February 18, 2011, 150 days after the new release date. *Id.*  
21

22  
23 Plaintiff names the Washington Department of Corrections, Clallam Bay Corrections  
24 Center, Thurston County Superior Court, Thurston County Clerks Office, Thurston County  
25 Office of Assigned Counsel, Betty J. Gould, Robert Jimmerson, John Tunheim, Dan Pacholke,  
26 and the Thurston County Prosecutors’ Office as Defendants.

1 Based on the foregoing, Plaintiff has failed to state a claim upon which relief may be  
2 granted under 42 U.S.C. § 1983. To state a claim under § 1983, a complaint must allege: (i) the  
3 conduct complained of was committed by a person acting under color of state law and (ii) the  
4 conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws  
5 of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 687 L.Ed.2d 420  
6 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is  
7 the appropriate avenue to remedy an alleged wrong only if both of these elements are present.  
8 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985).

10 Whether Plaintiff suffered a constitutional deprivation by being incarcerated beyond the  
11 termination of his sentence is critical to the Court's determination of whether state defendants are  
12 liable under § 1983. In the case of *Sample v. Diecks*, 885 F.2d 1099 (3d Cir. 1989), the Third  
13 Circuit outlined the elements of a § 1983 claim in this context:

15 [A] plaintiff must first demonstrate that a prison official had knowledge of the  
16 prisoner's problem and thus of the risk that unwarranted punishment was being,  
17 or would be, inflicted. Second, the plaintiff must show that the official either  
18 failed to act or took only ineffectual action under circumstances indicating that his  
19 or her response to the problem was a product of deliberate indifference to the  
20 prisoner's plight. Finally, the plaintiff must demonstrate a causal connection  
21 between the official's response to the problem and the infliction of the unjustified  
22 detention.

23 885 F.2d at 1110.

24 Plaintiff must name individual state defendants who had knowledge of his concern that  
25 his sentence had been miscalculated. He must allege what action or inaction by each *individually*  
26 named defendant caused his unjustified detention. Section 1983 authorizes assertion of a claim  
for relief against a "person" who acted under color of state law. A suable §1983 "person"  
encompasses state and local officials sued in their personal capacities, municipal entities, and

1 municipal officials sued in an official capacity. *Will v. Michigan Department of State Police*,  
2 491 U.S. 58 (1989). Entities such as the Washington State Department of Corrections, Clallam  
3 Bay Corrections Center, Thurston County Superior Court, Thurston County Clerks Office,  
4 Thurston County Office of Assigned Counsel, and the Thurston County Prosecutors' Office are  
5 not "persons" for purposes of a section 1983 civil rights action.

6  
7 Due to the deficiencies described above, the Court will not serve the complaint. Plaintiff  
8 may file an amended complaint curing, if possible, the above noted deficiencies, or show cause  
9 explaining why this matter should not be dismissed no later than **November 2, 2012**. If Plaintiff  
10 chooses to amend his complaint, he must demonstrate how the conditions complained of have  
11 resulted in a deprivation of his constitutional rights. The complaint must allege in specific terms  
12 how each named defendant is involved. The amended complaint must set forth all of Plaintiff's  
13 factual claims, causes of action, and claims for relief. Plaintiff shall set forth his factual  
14 allegations **in separately numbered paragraphs** and shall allege with specificity the following:

- 15  
16 (1) the names of the persons who caused or personally participated in causing the  
17 alleged deprivation of his constitutional rights;
- 18 (2) the dates on which the conduct of each Defendant allegedly took place; and
- 19 (3) the specific conduct or action Plaintiff alleges is unconstitutional.

20 The amended complaint shall operate as a complete substitute to the present complaint.  
21 Therefore, reference to a prior pleading or another document is unacceptable – once Plaintiff  
22 files an amended complaint, the original pleading or pleadings will no longer serve any function  
23 in this case.

24  
25 Plaintiff shall present his complaint on the form provided by the Court. The amended  
26 complaint must be **legibly rewritten or retyped in its entirety**, it should be an original and not a

1 copy, it may not incorporate any part of the original complaint by reference, and it must be  
2 clearly labeled the “Amended Complaint” and must contain the same cause number as this case.  
3 Plaintiff should complete all sections of the court’s form. Plaintiff may attach continuation  
4 pages as needed but may not attach a separate document that purports to be his amended  
5 complaint. **Plaintiff is advised that he should make a short and plain statement of claims**  
6 **against the defendants. He may do so by listing his complaints in separately numbered**  
7 **paragraphs. He should include facts explaining how each defendant was involved in the**  
8 **denial of his rights.**  
9

10 The Court will screen the amended complaint to determine whether it contains factual  
11 allegations linking each defendant to the alleged violations of Plaintiff's rights. The Court will  
12 not authorize service of the amended complaint on any Defendant who is not specifically linked  
13 to the violation of Plaintiff's rights.  
14

15 If Plaintiff decides to file an amended civil rights complaint in this action, he is cautioned  
16 that if the amended complaint is not timely filed or if he fails to adequately address the issues  
17 raised herein on or before **November 2, 2012**, the Court will recommend dismissal of this action  
18 as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a “strike” under 28  
19 U.S.C. § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who  
20 brings three or more civil actions or appeals which are dismissed on grounds they are legally  
21 frivolous, malicious, or fail to state a claim, will be precluded from bringing any other civil  
22 action or appeal in forma pauperis “unless the prisoner is under imminent danger of serious  
23 physical injury.” 28 U.S.C. § 1915(g).  
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